

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OMAR ZOKRI,

Defendant-Appellant.

UNPUBLISHED

March 15, 2011

No. 291925

Wayne Circuit Court

LC No. 08-015586-FH

Before: MURPHY, C.J., and STEPHENS and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b(1). We affirm.

On September 1, 2008, defendant and Michael Langdon got into an argument about whether defendant had shorted Langdon one dollar after making a purchase at the gas station at which defendant worked. Langdon acknowledged that he purposefully knocked a box of candy on the floor. He claimed that defendant then came around the counter brandishing a rifle and made various threats to Langdon. Defendant denied that he did so.

A videorecording of the altercation was apparently made and stored on the gas station's computer. However, defendant and another employee said they did not know how to work the equipment. They called the owner, who had a code that was needed to access the videorecording. However, he was not immediately available.

Before trial, defendant brought a motion to dismiss based on the failure of the police to provide discovery, including the failure to timely secure the videorecording. The transcript of a November 6, 2008, preliminary examination hearing indicates that on September 15, 2008, the judge made a notation that the police were to view the videorecording at the gas station, that on October 2, 2008, the matter was adjourned, and that on October 20, 2008, the judge made another notation indicating that the police were going to obtain the video. Detective Denise Parker stated that she had gone to the gas station on September 11, 2008, and looked at the equipment but there was no recording; the person helping her could only produce a still photograph that did not show anything of relevance. Given this attempt, Parker could not

explain why a directive to retrieve the video was made on September 15, 2008. She indicated that she was in the hall when the ruling was made. She apparently thought that the September 11, 2008, attempt satisfied the September 15, 2008, order. Following the October 20, 2008, hearing, it appears that a video technician from the police department was sent out but he could not retrieve anything from the computer. The October 20, 2008, directive may have been to send the computer to the Michigan State Police, but Detective Parker apparently understood that sending the video technician would suffice. At the November 6, 2008, hearing, there was a clear order to get the hard drive and to take it to the State Police. The court indicated that it would issue an order allowing the hard drive to be taken and directing the State Police to inspect it. At the hearing on the motion to dismiss, counsel represented that on November 26, 2008, the computer was sent to the State Police, but footage of the incident could not be recovered.

Defendant argues that the trial court erred in failing to dismiss the case based on the failure to preserve the videorecording. He maintains that the failure to respond to the court orders to do so demonstrated bad faith. We review the trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

In *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), the United States Supreme Court held that the suppression of evidence *favorable to a defendant* "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." However, in *Arizona v Youngblood*, 488 US 51, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988), the Court distinguished between evidence that would be favorable to a defendant and evidence of which no more can be said than that it *might* exonerate the defendant. The Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve *potentially* useful evidence does not constitute a denial of due process of law." *Id.* at 58 (emphasis added). On the existing record, the most that can be concluded is that the videorecording of the incident, if one even exists, might be favorable to defendant; therefore, defendant had to establish bad faith on the part of the police.

Defendant maintains that the failure to follow the court orders to obtain the videorecording demonstrates bad faith. However, it appears that Detective Parker believed that she had complied with the first two orders. Although she did not send the computer to the State Police in response to those orders, it is not clear that this was the directive and, in any event, her confusion regarding the order would not amount to bad faith. Consistent with the third order, the computer was sent to the State Police for inspection. Furthermore, the multiple efforts by police to actually retrieve the video footage left them empty-handed. And it must also be mentioned that the video equipment and assumedly the pertinent footage remained at the gas station where

defendant worked and was not in the custody of the police department.¹ Because defendant did not show bad faith, the trial court did not abuse its discretion in denying defendant's motion to dismiss.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly

¹ We note that, on the date of the crime, defendant told a responding police officer that he did not have access to the video equipment because it was behind a locked door. But when police checked the door, it was found to be unlocked.